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NOS. 84-237, 84-238 and 84-239

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*,
Appellants,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR APPELLANT CHANCELLOR

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Question Presented

Whether a board of education program, funded pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701 *et seq.*, providing remedial instruction and related services to educationally deprived children through public school teachers and professionals in nonpublic schools, violates the Establishment Clause of the First Amendment, where sixteen years of experience under the program has revealed no effect of advancing religion or excessive government entanglement, and prior attempts to provide such remedial services away from the nonpublic schools were unsuccessful?

Parties to the Proceeding

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the Court of Appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the District Court and were appellees in the Court of Appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the District Court and appellants in the Court of Appeals.

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BRIEF FOR APPELLANT CHANCELLOR

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which is reprinted in the Appendix to the Jurisdictional Statement submitted by the Solicitor General at page 1a, is reported *sub. nom. Felton* v. *Secretary, United States Dept. of Educ.* at 739 F.2d 48. The opinion of the United States District Court for the Eastern District of New York, which is reprinted in the Appendix to the Jurisdictional Statement at page 55a, is unreported. The opinion of the three-judge court in *National Coalition for Public Education and Religious Liberty* v. *Harris,* which is reprinted in the Appendix to the Jurisdictional Statement at page 60a, and upon which the District Court relied, is reported at 489 F. Supp. 1248.

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 9, 1984. A timely notice of appeal to this Court was filed in the Court of Appeals on behalf of the Chancellor of the Board of Education of the City of New York on August 2, 1984. The Chancellor's Jurisdictional Statement was timely filed and the appeal was docketed on August 13, 1984. On October 9, 1984, this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits, and consolidated this appeal with the appeals under docket nos. 84-237 and 84-238. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1252.[1]

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[1] We will not argue the issue of juridiction in this brief, but rely on the jurisdictional arguments set out in the brief submitted by the Solicitor General and in the Chancellor's Jurisdictional Statement at pp. 3-4.

Constitutional, Statutory and Regulatory Provisions Involved

The relevant constitutional, statutory and regulatory provisions are set out at pages 108a through 127a of the Appendix to the Jurisdictional Statement.

Statement of the Case

(1)

This action was commenced by plaintiffs, six federal taxpayers residing in the State of New York, for a declaration that Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701 *et seq.* ("Title I") is violative of the Establishment Clause of the First Amendment of the Constitution to the extent it authorizes the expenditure of federal funds to finance educational services in religious schools during school hours; injunctive relief was also requested (JA:9-13).[2] Plaintiffs joined the Chancellor of the Board of Education of the City of New York as a defendant because the Board of Education administers a Title I program which provides remedial instruction and related services to educationally deprived children who are students at nonpublic schools, through public school teachers and other professionals, which services are provided during school hours on the site of the nonpublic schools (JA:11). The District Court granted the defendants' motion for summary judgment dismissing the complaint, holding that plaintiffs had failed

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[2] References within parentheses preceded by the designation "JA" are to the Joint Appendix. References preceded by the designation "App" are to the Appendix to the Jurisdictional Statement submitted by the Solicitor General.

to show that Title I, as administered in the nonpublic schools of New York City, violates the Establishment Clause of the First Amendment (App:55a-59a). The Court of Appeals reversed and granted summary judgment to plaintiffs, declaring that the provision of remedial instruction and related counseling services on the site of religious affiliated schools required such continuing state surveillance to assure religious neutrality that such surveillance itself is an unconstitutional entanglement of church and state (App:4a, 35a, 36a). The Court of Appeals has stayed the issuance of its mandate until thirty days after final disposition of any proceedings in this Court (App:54a).

(2)

In 1965, Congress enacted the Elementary and Secondary Education Act of 1965. Title I of that Act was enacted to provide federal funding for educational programs to be administered by local public educational agencies and directed to educationally deprived children in low-income areas. Congress, recognizing the significant correlation between poverty and learning deficiencies, and that full educational opportunities to all children regardless of economic background would help break the poverty cycle suffered by many in this country, "declare[d] it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. §2701; *see* S. Rep. No. 146, 89th Congress, 1st

Sess., *reprinted in* [1965] *U.S. Code Cong. & Ad. News*, pp. 1146, 1450.[3]

While Title I is administered by local public education officials, the Congressional aim was to provide needed assistance to educationally deprived children, whether those children attended public or private schools. *See, Wheeler* v. *Barrera*, 417 U.S. 402, 406-407 (1974), *mod.*, 422 U.S. 1004 (1975). Both Title I and regulations promulgated thereunder require that the services provided pursuant to Title I to students in nonpublic schools be comparable to those provided to students enrolled in public schools. *Id.*, 417 U.S. at 415; 20 U.S.C. §3806(a), setting out identical language to that contained in former section 2740(a) ("Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal . . . to expenditures for children enrolled in the public schools of the local education agency."); 34 C.F.R. §200.71 (1983) (Department of Education Regulations requiring that local educational agency make equivalent expenditures for private and public school students, and that the services provided to private school students be equitable in relation to services provided to public school students). During the 1980-81 school year, approximately 5,200,000 public school students and

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[3] Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. While Congress intended, through Chapter 1, to eliminate paperwork and unnecessary federal control over Title I programs, it restated its policy of providing financial assistance to State and local educational agencies to meet the special needs of educationally deprived children. 20 U.S.C. §3801. In this brief we will continue to refer uniformly to Title I, as did the Court of Appeals (App: 3a).

approximately 190,000 nonpublic school students received educational and related services through Title I projects (JA:34).

The New York City Board of Education is the local agency responsible for administering the Title I remedial educational services program in the City of New York. When Title I funds first became available for the 1965-66 school year, the Board attempted to provide services to nonpublic school students by requiring them to travel to public schools after regular school hours to receive remedial services from public school employees (JA:63; App:7a). Attendance was poor, and later in the 1965-66 school year the Board transferred some Title I services to nonpublic schools after school hours (JA:63-64; App:7a). However, attendance remained poor. Under both approaches, teachers were tired, students inattentive, parents expressed concern about the safety of their children, and there was little communication between Title I professionals and the classroom teachers (JA:63-64; App:7a, 71a). A proposed alternative that services be provided to nonpublic school students at public schools during regular school hours was rejected because of the doubtful constitutionality of participation of parochial school students in such a program. New York State Constitution, Art. XI, §3 (JA:64; App.8a, 71a).

Accordingly, in August 1966, the Board of Education adopted a program for providing remedial services to disadvantaged children on nonpublic school premises during the school day. The services would be provided by teachers in the public school system who would go from one school to another during the school day, and none of the work would duplicate any of the regular classroom work of the schools involved. Certain proposed programs, like speech improvement and library services, were eliminated

as being too close to regular classroom work or providing services to the nonpublic schools rather than the children (JA:64-66; App:72a).

The program adopted by the Board of Education in 1966 has continued to this day, and in 1981, it was anticipated that 21,000 nonpublic school students would receive Title I remedial services under that program (JA:38) The Board provides five types of remedial services to students at nonpublic schools: remedial reading, remedial skills centers, remedial mathematics, English as a second language, and clinical and guidance services (JA:45-46; App:10a-11a). The Board's program has been successful and participating students have shown measurable improvement in overcoming their learning disabilities (JA: 68-70). Subsequent studies have shown that its program costs considerably less than an off-site program under which transporation and other additional costs would consume 42% of the budget allocated to the nonpublic school Title I program (JA:66-68; App:8a-9a). Nonpublic schools with children receiving Title I instructional services typically set aside a classroom for exclusive use by Title I teachers. None of the nonpublic school facilities used for Title I programs contain any religious symbols or artifacts (JA:58-59; App:13a, 74a). The teachers assigned to the nonpublic school Title I program are regular salaried employees of the Board of Education (JA:46; App: 11a). Determination of which nonpublic schools a teacher or other professional will serve in is made by the Board's Bureau of Nonpublic School Reimburseable Services. Parochial school officials have no voice in the initial assignment of a Title I teacher (JA:48; App:11a, 73a-74a). Religion is not a factor in Title I assignment (JA:48; App:11a). The amount of time a Title I teacher spends at any particular nonpublic school is determined solely by the number and needs of the students eligible for Title

I assistance; in the 1981-82 school year, 78% of teachers worked in more than one nonpublic school, with children in 180 of 231 nonpublic schools receiving services from itinerant teachers (JA:49; App:11a-12a).

Prior to assignment, the Title I professionals are given guidelines which emphasize that they are accountable only to their Title I supervisors, and not to any nonpublic school official (JA:50). They are instructed not to engage in team-teaching or other cooperative instructional activities with nonpublic school teachers, although they may engage in purely professional consultations with nonpublic school teachers concerning the students' needs and progress (JA:50-51; App:12a, 74a). The teachers are directed not to introduce any religious matter into their teaching, and to refrain from any involvement in religious activities of the school (JA:51; App:12a, 74a). The Title I professionals are supervised by field supervisors employed by the New York City Board of Education who are expected to make at least one unannounced visit each month to review the performance of the Title I professional (JA:52-53; App:11a, 99a). Other supervisors provide monthly in-service training sessions, frequently on days when nonpublic schools are otherwise closed for religious holidays (JA:54; App:13a). While a large majority of the Title I teachers work in nonpublic schools which have religious affiliations different from their own, there has never been a recorded complaint by a Title I teacher of interference by nonpublic school authorities, or a report by a supervisor that teachers have engaged in religious activities (JA:49-50, 52; App.12a, 13a, 74a).

Teaching materials and equipment used in the Title I program are selected by Board employees, and may not duplicate materials used in regular classroom instruction or contain any religious content; all equipment and material is labeled as Board property, locked in storage

when not used, and is subject to annual inventory (JA: 55-57; App:13a). While there are necessarily routine administrative contacts between the Board of Education and the nonpublic school officials, they consist of three general categories of communication: 1) information about Title I; 2) processing requests for services by the schools; and 3) resolving scheduling problems and other questions concerning implementation of the Title I program (JA: 59-63; App:99a-100a).

(3)

In 1976, certain plaintiffs brought an action against the Secretary of the then Department of Health, Education and Welfare and the Chancellor of the Board of Education of the City of New York to enjoin the Board's Title I program for remedial education at parochial schools. *National Coalition for Public Ed.* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y., 1980) (hereinafter, *"Pearl"*). A three-judge court was convened. In May 1979 an evidentiary hearing was held before that Court and testimony and numerous affidavits and documentary evidence concerning the operation of the Board's Title I program in nonpublic schools were considered (App:64a).[4] The defendants presented seven witnesses who were either teachers or administrators under the Board's program (App:64a). In April 1980, the three-judge court issued its detailed opinion finding that the Board's Title I program did not violate the Establishment Clause of the First Amendment (App: 60a-103a). In applying this Court's three-pronged test,

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[4] In *Pearl,* plaintiffs seeking to proceed solely against the federal defendants and discontinue their action against the Board of Education conceded that "there is no [constitutional] violation in respect to any school within the City of New York and we ask no relief against the City of New York." (App: 65a).

the Court found first that Congress had a secular legislative purpose in passing Title I, *i.e.*, aid to needy children wherever they might attend school (App:76a-77a). The Court further found that the Title I program in New York does not have a primary effect of advancing religion, pointing out that: the federal aid went to the child rather than the school, with the child not being a mere formal recipient of the aid; the nonpublic schools are not pervasively sectarian; more than a decade's experience showed that Title I materials and equipment were not diverted from their intended use; while the classrooms used were physically unified to the nonpublic schools, all instruction remained educationally distinct, and there had been no religious enhancement through the program (App:77a-92a). Finally, the Court held that the program neither creates excessive entanglement nor results in divisive political fragmentation (App:102a). In reaching this conclusion, the Court noted, *inter alia,* that the Title I supervisors reviewed only the performance of the Title I teacher in the Title I classroom and had little contact with the nonpublic school staff, and that administrative contacts had not led to any confrontation between government officials and parochial school administrators (App:98a-100a). The Title I program has little potential for "divisive religious fragmentation in the political arena" because Title I is a nationwide program, with only about 4% of the national Title I budget allocated to nonpublic school students (App: 101a). Thus there was little chance of political debate along religious lines, and there was no evidence such debate had occurred since passage of Title I (App:101a-102a). Furthermore, the expenditure of funds for each public and nonpublic student must be comparable (App: 102a).

The appeal by plaintiffs in *Pearl* was dismissed by this Court for lack of jurisdiction. *National Coalition for Public Ed.* v. *Hufstedter,* 449 U.S. 808 (1980), *reh. den.,* 449 U.S. 1028 (1980).

(4)

This action was commenced in the United States District Court for the Eastern District of New York in 1978. As the case raised the same issues as *Pearl,* this case was stayed pending disposition of that suit (App:55a-56a). Upon final disposition in *Pearl,* motions and cross-motions for summary judgment were made, and the parties stipulated that the evidentiary record in *Pearl* be made a part of the record of this case, along with certain additional affidavits (App:10a, 56a). The District Court, in a memorandum order dated October 4, 1983, adopted the opinion of the three-judge court in *Pearl,* and granted the defendants summary judgment dismissing the complaint (App:55a-57a). The District Court also stated that the direct evidence in the record demonstrated that the Board's Title I program had resulted in no unconstitutional mixing of government and religion (App:56a-57a). A judgment dismissing the complaint was entered October 20, 1983 (App:58a-59a).

(5)

Upon plaintiffs' appeal to the Court of Appeals for the Second Circuit, that Court reversed, granted summary judgment to plaintiffs, and held that the Board's Title I plan violates the Establishment Clause. After a lengthy discussion of those decisions of this Court which it deemed pertinent, the Court of Appeals broadly held that the Establishment Clause permits public funds to be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises of the religious school (App:35a-36a). Provision of such services by public em-

ployees on the site of a religious school required such continuing state surveillance to assure religious neutrality that such surveillance itself would be an unconstitutional entanglement of church and state (App:36a). In making its finding of unconstitutionality, the Court of Appeals recognized that the Board of Education's program had "apparently . . . done so much good and little, if any, detectable harm." (App:52a). The Court also conceded that any alternative means of using Title I funds for students in religious schools would "almost certain[ly] . . . be less effective, more costly, or both." (App:52a).

The Court of Appeals did not decide whether the Board's program failed the "primary effect" test, but commented on some of the arguments presented by the defendants on that issue. The Court noted that, despite the proof submitted by defendants concerning the sixteen years of experience under the Board's Title I program for nonpublic school students, which evidence showed that there was no known instance of a Board employee becoming involved in the religious activities of an nonpublic school or injecting religious topics into his remedial instruction, the Board could not "dispel the possibility that in some significant number of instances a public school teacher has succumbed to religious influences. . . ." (JA:52; App:38a). The Court also stated that focus on the actual working of the program constituted an incorrect first amendment analysis; rather, the "potentials" for violation must be determined (App:41a). The Court also commented that approval of the Board's program could lead to political pressure to extend the use of public teachers in parochial schools to subjects like chemistry or mathematics; approval of the Board's program "would let the genie out of the bottle." (App:42a). Likewise, the regular appearance of public school teachers in parochial schools has "symbolic significance", giving the appearance of a "joint

entrprise" with some teachers paid by the public and others by a religious sponsor (App:44a). The Court also stated that the parochial schools involved in the program were sufficiently sectarian that a fair case might be made that the City's Title I program constitutes a "direct and substantial advancement of religious activity" but that in any event their nature required a degree of surveillance that would constitute unconstitutional entanglement (App: 47a-48a). Finally, the Court, in commenting on what it termed "necessary effect" arguments, stated that the circumstance that the services were provided to students in both public and nonpublic schools was of no constitutional significance and rejected the argument that the aid here was to the children rather than to the parochial schools (App:50a-51a). However, the Court restricted its holding of constitutional violation to its finding of excessive entanglement (App:51a).

Summary of Argument

The Court of Appeals has frustrated the Congressional intent and voided a successful Title I program that has assisted those educationally deprived children in the City of New York who happen to be students in parochial schools, finding only that the program's potential for entanglement is excessive (App:36a, 41a). The Court of Appeals' finding is inconsistent with the record evidence of the operation of the Board of Education's program since 1966, and fails to provide the accommodation of religion required by the First Amendment. *See, Lynch* v. *Donnelly,* —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.,* —— U.S. ——, 104 S. Ct. 2376 (1984); *see also, Mueller* v. *Allen,* —— U.S. ——, 103 S. Ct. 3062 (1983); *Marsh* v. *Chambers,* —— U.S., ——, 103 S. Ct. 3330 (1983).

Under this Court's three pronged analysis (*see e.g., Hunt* v. *McNair,* 413 U.S. 734, 741 [1973]), it is apparent that the Board's program does not violate the Establishment Clause of the First Amendment. The Congressional purpose of assisting educationally deprived children is a proper secular purpose. The program's primary effect has not been the advancement or inhibition of religion. Title I is a national program providing benefits to millions of educationally deprived students; both across the nation, and in New York City, only a small minority of the students receiving benefits are nonpublic school students. Furthermore, consistent with Title I requirements, the Board provides Title I assistance to public and nonpublic students on a per capita basis. Such a broad provision of benefits to public and nonpublic students is an important index of secular effect. *Mueller* v. *Allen, supra,* 103 S. Ct. at 3068. The aid is provided to the student rather than the school (*Wheeler* v. *Barrera, supra,* 417 U.S. at 406), and this is another strong indication of secular rather than religious effect. *Mueller* v. *Allen, supra,* 103 S. Ct. at 3069. In light of these considerations, and as a result of safeguards adopted by the Board of Education (*e.g.,* use of religiously neutral classrooms, detailed instructions to Title I professionals, and regular supervision of Title I professionals by Board personnel), the Board's program has had, at most, a remote effect on religion. *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364.

Finally, the record shows that there has been no excessive entanglement. The Board's contacts with the administration of the nonpublic schools are minimal and would not change significantly even were the program administered off the sites of the nonpublic schools. The Board supervises only its own employees in the context of religiously neutral facilities located on the site of the nonpublic schools. As the three judge court in *Pearl*

found as fact, Title I personnel have not become involved in the affairs of parochial schools; any potential for entanglement has not been borne out by the record. (App:99a-100a). This case is distinguishable from *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *reh. den.*, 422 U.S. 1049 (1975), cited by the Court of Appeals, because: a federal program is involved; there is little potential for political divisiveness along religious lines; and there can be no charge that the program is a veiled attempt to aid parochial schools. Furthermore, the nonpublic schools involved in the subject case are not the pervasive religious institutions which concerned this Court in *Meek*, and the Board's program, unlike that in *Meek*, has a long history showing that any feared potential for excessive entanglement has not been realized.

ARGUMENT

The New York City Board of Education's Title I program for the provision of remedial education services to educationally deprived children on nonpublic school premises does not violate the Establishment Clause of the First Amendment.

(1)

The Court of Appeals has found unconstitutional a substantial and successful remedial program providing services to tens of thousands of educationally deprived children who are students at parochial schools in the City of New York. The Court of Appeals, without deciding whether the program had an impermissible religious effect but rather holding that its potential for entanglement is excessive, thereby has frustrated the clear Congressional intent that these children along with all eligible children

in public schools receive needed remedial assistance, and would require that these services be provided off-site at an increased cost with a significantly greater percentage of funding being allocated to administrative costs (App: 72a-73a). It is submitted that the Board of Education's program is consistent with the requirements of the First Amendment, and that the judgment of the Court of Appeals must be reversed.

This Court has long recognized that the First Amendment does not require or even make desirable a total separation of Church and State. *Lynch* v. *Donnelly,* —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.,* —— U.S. ——, 104 S. Ct. 2376 (1984); *Comm. for Public Education* v. *Nyquist,* 413 U.S. 756, 760 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971). Rather, "the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* at 614. Furthermore, as has been recently restated by this Court, the First Amendment affirmatively requires accommodation, rather than mere tolerance, of all religions. *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1359; *see also, Mueller* v. *Allen,* — U.S. ——, 103 S. Ct. 3062 (1983) (Minnesota statute allowing taxpayers, including parents of parochial school children, to deduct educational expenses, held not violative of First Amendment); *Marsh* v. *Chambers,* —— U.S. ——, 103 S. Ct. 3330 (1983) (Nebraska practice of opening legislative session with prayer offered by chaplain whose salary is paid from public funds is not a constitutional violation). Anything less than accommodation might well be inconsistent with the First Amendment guarantee of free exercise. *Lynch* v. *Donnelly, supra,* at 1359. This Court has been particularly sensitive to sophisticated attempts to channel aid to church-related nonpublic schools as part of a pro-

gram to aid all school children, frequently made in response to prior decisions of this Court striking down other forms of aid. *See e.g., Wolman* v. *Walter,* 433 U.S. 229, 233 (1977); *Meek* v. *Pittenger,* 374 F. Supp. 639, 664 (E.D. Pa., 1974) (dissent, Higginbotham), *revd. in part,* 421 U.S. 349 (1975.) The instant case does not involve a veiled attempt to assist parochial education. Any benefit to the student (in increased learning skills) is enjoyed not merely by the school in which he is a student, but by the nation as a whole.

This Court's three-pronged analysis provides "helpful signposts" for dealing with Establishment Clause challenges. *Hunt* v. *McNair,* 413 U.S. 734, 741 (1973). There is no question that Congress' purpose of assisting educationally deprived children is a proper secular purpose. As for the second prong of the test, on which the Court of Appeals made no finding, it is submitted that any effect on religion, rather than being a primary one, is, at most, an "'indirect', 'remote,' or 'incidental'" one. *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. Title I aid extends to a broad class of recipients; more than 95% of the nation's students who participate in Title I programs are public school students (JA:34). Even in New York City, only about 13.2% of the students eligible for Title I assistance are nonpublic school students (JA:38). Furthermore, funds are allocated by the Board to public school and nonpublic school Title I programs on a per-capita basis (JA:43; App:7a). See, *Mueller* v. *Allen, supra,* 103 S. Ct. at 3068 (Availability of tax benefits to parents of students in both public and private schools is an important index of secular benefit). Such assistance, consistent with Congressional intent, is provided to "educationally deprived children rather than to specific schools." *Wheeler* v. *Barrera,* 417 U.S. 402, 406 (1974), *mod.,* 422 U.S. 1004 (1975). The provision of assistance directly to parents or children rather than to parochial schools is an im-

portant consideration in Establishment Clause analysis. *See, Mueller* v. *Allen, supra,* at 3069; *compare, Comm. for Public Educ.* v. *Nyquist, supra,* 413 U.S. 756 (Tax credit scheme, unrelated to amount actually expended on tuition and available only to parents of children in nonpublic schools, violates First Amendment). Finally, the record evidence shows that the provision of the remedial services on nonpublic school premises has had a secular rather than a religious effect (App:91a-92a). Among the factors which have assured that the effect was secular are the use of religiously neutral materials and classrooms, appointment of Title I teachers on a religiously neutral basis, detailed instructions to Title I teachers upon assignment delineating their duties to the secular program and their students, rather than to the nonpublic schools, and the use of Board personnel to regularly supervise their performance (JA:48-59; App:12a-13a, 73a-75a). As a result of such safeguards, there has been no recorded complaint by a Title I teacher of interference by nonpublic school authorities, or any report by a Title I supervisor that a teacher has engaged in religious activity (JA:52; App:13a).

The use of public school employees, generally working as itinerants and supervised only by other public school employees, working in religiously neutral classrooms and having only necessary professional relations with nonpublic school staff, has resulted in no religious impact. *See Wheeler* v. *Barrera, supra,* at 426 (Different First Amendment problems implicated where Title I funds are used to pay a former parochial school teacher working fulltime in a parochial school, than where "a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week."); *see also,* opinion of Justice Brennan, upon denial of certiorari in *Neb. State Board of Educa-*

tion v. *School Dist. of Hartington*, 409 U.S. 921, 924-926 (1972) (No violation of First Amendment where public school district leased religiously neutral classrooms from parochial school for provision of Title I remedial courses to public and parochial school students). As was stated in a 1971 report by the United States Office of Education, and quoted by the Court of Appeals (App:14a):

> "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), *reproduced in Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials*, U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

This Court has recently upheld, as not violative of the Establishment Clause, a tuition tax deduction plan providing substantial benefits to, *inter alia*, the parents of parochial school children (*Mueller* v. *Allen*, *supra*, 103 S.Ct. 3062), the erection of a Christmas nativity scene by a municipality as part of a Christmas display (*Lynch* v. *Donnelly*, *supra*, 104 S.Ct. 1355) and the payment out of state funds of a salary to a legislative chaplain (*Marsh* v. *Chambers*, *supra*, 103 S. Ct. 3330). In the instant case, the Board's program can have no greater impact on religion than the activity at issue in those cases. Furthermore, this Court has stated that the provision of remedial services to a segregated group of parochial students, albeit at a neutral site away from the sectarian school, is constitutional. *Wolman* v. *Walter*, *supra*, 433 U.S. at 244-248. It is submitted that the Board's program for providing remedial assistance to nonpublic students, provided on-

site but with a sixteen year history of having a secular impact and costing considerably less than an off-site program, is likewise consistent with the dictates of the First Amendment.

The final prong of this Court's three-part analysis, excessive entanglement, is the basis for the Court of Appeals' finding of unconstitutionality, and it is submitted that such finding is unsupported. As this Court has stated, entanglement is "a question of kind and degree." *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. Furthermore, this Court has recognized that the State has a substantial interest in assuring that its youths receive an adequate secular education, and may take steps to ensure that its legitimate interest is being fulfilled. *Wolman* v. *Walter, supra,* 433 U.S. at 240 (Blackmun, J.). The administrative contacts involved here are minimal and do not violate the First Amendment. *Cf., Tilton* v. *Richardson,* 403 U.S. 672, 687 (1971), *reh. den.,* 404 U.S. 874 (1971) (Inspections upheld where hardly more serious than those imposed under state compulsory education laws.) The contacts with the administrators of the nonpublic schools would not be significantly lessened even were the remedial services provided off the sites of the nonpublic schools. Likewise, the Board's supervision of the Title I professionals, who are its own employees, does not involve it in the "details of administration" of the nonpublic schools. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. The three-judge court in *Pearl,* after a consideration of the record evidence, which shows that the Board's relationship with nonpublic school authorities is essentially informational and that the Title I professionals, consistent with the Board's guidelines, have limited their teaching to their secular Title I duties, found as fact that administrative contacts between Title I personnel and nonpublic school administrators do not involve the former in the affairs of parochial schools and

fall within the realm of permissible government-church contacts; any "potential" for entanglement has not been borne out by the record of the program (JA:52, 59-61; App:99a-100a).

In finding that the Board's Title I program necessarily leads to excessive entanglement, the Court of Appeals described as "most pertinent" this Court's decision in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *reh. den.*, 422 U.S. 1049 (1975) (App:27a). That case is distinguishable from the subject litigation. *Meek* involved a Pennsylvania program furnishing, *inter alia*, remedial teachers to teach on the nonpublic school premises. In *Meek* this Court pointed to the program's potential for political divisiveness; the annual appropriations process would lead to repeated confrontations along religious lines between proponents and opponents of the auxiliary-services program. 421 U.S. at 372; *see also, Lemon* v. *Kurtzman, supra*, 403 U.S. at 622-623. The program involved here is a federal program, and only a small minority of the recipients of its aid are nonpublic school students. There is little potential for political divisiveness along religious lines, and plaintiffs have not presented any evidence of divisiveness along political lines arising in connection with Title I appropriations (App:101a-102a).[5] The nonpublic schools at which remedial services are provided by the Board are not the pervasively sectarian institutions which concerned this Court in *Meek*. 421 U.S. at 356. The schools involved are generally located in poorer areas, and serve many black children of religious persuasion other than the school at-

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[5] In *Mueller* v. *Allen, supra*, 103 S. Ct. at 3071, n. 11, this Court limited the "political diviseness" inquiry to instances where "direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Accord, Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1364-65.

tended; for instance, four Catholic schools in the borough of Brooklyn have non-Catholic enrollments in excess of 40% of their student population (JA:258, 278-279). In several elementary schools in the New York Archdiocese, a majority of the students are non-Catholic (JA:258). The schools do not restrict admission by religion, or restrict hiring of staff by religion, and the three-judge court in *Pearl* found that their lesser religious character reduced the need for continuous surveillance needed in *Meek* (JA:261-264, 278; App:87a, 96a). Furthermore, *Meek* involved a recently enacted program, and this Court held that it would be improper to rely on the "good faith and professionalism of the secular teachers . . . to ensure that a strictly non-ideological posture is maintained." 421 U.S. at 369. In connection with the Board's Title I program, there is sixteen years of experience where there has been no impermissible church-state involvement (App: 92a, 100a). Finally, the state program in *Meek* (as in *Wolman* v. *Walter, supra,* 433 U.S. 229, another decision cited by the Court of Appeals), was an obvious attempt to channel aid to parochial schools, albeit in a manner fitted to prior decisions of this Court. Under such circumstances, the danger of aiding religion, and the necessary entanglement required to prevent such assistance, is far greater than in a far-reaching federal program having only an incidental effect on religion or religious schools.

In sum, the record evidence shows that the Board of Education's attempts to provide Title I remedial assistance to nonpublic school students, either off-site or after school hours, were unsuccessful in fulfilling the Congressional purpose of assisting all educationally deprived children; that off-site provision of remedial services requires a far greater allocation of Title I funds to non-instructional costs; and that the Board of Education's on-site program, over sixteen years of experience, has shown no religious

effect or excessive entanglement. Despite this record evidence, and based on a finding of *potential* excessive entanglement, the Court of Appeals has found unconstitutional a program that has been successful in achieving the goals of Congress in enacting Title I. The decision of the Court of Appeals will have a negative impact on the right of children from the lower classes to be educated at parochial rather than public schools. Should such a child remain in the parochial school, he may be denied the remedial assistance which Congress intended to give him and which might enable him to compete with students from other social strata. He might even wish to enter the public school system on the secondary level, at which point he may be unable to compete with students who have already received Title I assistance in the public school system. It is submitted that the opinion of the Court of Appeals will serve only to frustrate the statutory rights of such children, and does not supply the accommodation of religion required by the First Amendment. *See, Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1359. The judgment of the Court of Appeals should be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with costs. The judgment of the District Court granting summary judgment to defendants upon a declaration that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment, should be reinstated.

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Respectfully submitted,

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